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## JOHN C. CALHOUN ON THE GUARANTEE CLAUSE

JOHN R. VILE\*

One of the most elusive provisions of the United States Constitution is the clause found in article IV, section 4, which guarantees each state a "Republican Form of Government."<sup>1</sup> In light of the many concepts associated with the notion of republicanism, this clause potentially could have become one of the most important in the Constitution.<sup>2</sup> Arguably, it is capable of reaching issues that courts in this century have tackled only under the equal protection clause of the fourteenth amendment.<sup>3</sup> In the nineteenth century, however, the Supreme Court gave the guarantee clause a restrictive reading from which it has never emerged.<sup>4</sup>

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1. The complete section reads: "The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S. CONST., art. IV, § 4.

2. One prominent expositor of the clause associates it with the prohibition of "regression to monarchical and aristocratic government" as well as to "the principles of popular sovereignty, representative government, majority rule, separation of powers, and federal supremacy." See Wiecek, *Guarantee Clause*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 874 (L. Levy ed. 1986).

3. Commentators have argued that the clause might have served as an alternative to the equal protection clause as a means of correcting state legislative malapportionment. See J. ELY, *DEMOCRACY AND DISTRUST* 118 n.\* (1980); see also Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. REV.* 1, 19 (1971) (discussing use of the equal protection clause in addressing legislative malapportionment).

In this context, one commentator has argued that the equal protection clause has had the effect of "stunting potentially broad constitutional development of the guarantee clause." See Kurland, *The Guarantee Clause as a Basis for Federal Prosecution of State and Local Officials*, 62 *S. CAL. L. REV.* 367 (1989).

4. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); see also *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (following reasoning of earlier cases). These cases primarily restricted the judicial role in relation to the guarantee clause. Cf. *Baker v. Carr*, 369 U.S. 186 (1962). The high point of congressional activity under the guarantee clause came during the early years of Reconstruction, but Congress has exercised little such power since. See W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION*

Because of contemporary disagreements over that decision and the meaning of republican government, a wide range of views exists today regarding the appropriate interpretation of the clause. In addition to suggesting that the clause might be an alternate means of correcting state legislative malapportionment,<sup>5</sup> commentators have viewed the clause as a way to: invalidate racially discriminatory initiatives;<sup>6</sup> remedy defects in state governmental structures that result in the violation of individual rights;<sup>7</sup> and guarantee that states adhere to their own constitutions and laws.<sup>8</sup>

One author has suggested that judicial review under the guarantee clause is a proper means to "limit state delegation of legislative power, place some constraints on initiatives and referenda, and subject state regulation to meaningful rationality review."<sup>9</sup> Another writer, arguing that the clause should be viewed primarily as a guarantee of state autonomy, has suggested more specifically that the clause should allow states to "have discretion to define their own franchises; to choose their own governmental structures; to set qualifications and salaries for officials performing legislative, executive, or judicial tasks; and to operate their governments as autonomous units rather than as branch offices of the federal government" as long as they do not violate other constitutional provisions.<sup>10</sup> Yet another scholar, writing in the wake of the Supreme Court's decision in *McNally v. United States*,<sup>11</sup> has suggested that the guarantee clause might be an effective basis for congressional legislation authoriz-

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116-209 (1972). Most, if not all, presidential actions that could have been justified by reference to the latter part of the guarantee section have been accompanied by other justifications. See Ferguson, *The Inherent Justiciability of the Constitutional Guaranty Against Domestic Violence*, 13 RUTGERS L. REV. 407, 413 (1959).

5. See J. ELY, *supra* note 3; Bork, *supra* note 3.

6. See Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881 (1970).

7. See Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681 (1981).

8. See Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984).

9. Note, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 209 (1987).

10. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 78 (1988).

11. 483 U.S. 350 (1987) (restricting federal prosecutions of mail fraud to cases involving property interests and excluding prosecutions based on the intangible right to honest government).

ing federal prosecutions of corrupt state and local officials.<sup>12</sup>

Historically, however, the guarantee clause has been a "dead letter" or "sleeping giant."<sup>13</sup> The quiescence of the clause may be traced to the Supreme Court's response to a crisis in the 1840s popularly known as Dorr's rebellion.<sup>14</sup> This paper examines the comments of John C. Calhoun on this crisis with a view towards ascertaining how his reflections, although dated and incomplete, might be relevant to contemporary discussions of the guarantee clause. To reach this end, a basic understanding of the issues posed by Dorr's rebellion is necessary.

## I. HISTORICAL PROLOGUE: DORR'S REBELLION

The seeds of Dorr's rebellion took root shortly after the American Revolution. At that time, rather than following the example of most other states that were drawing up new state constitutions,<sup>15</sup> Rhode Islanders decided instead to adapt their Charter of 1663, granted by Charles II, to the circumstances of independence.<sup>16</sup> In a fashion characteristic of the time it was originally granted,<sup>17</sup> the Charter neither made formal provision for its own amendment — as would a number of state constitutions adopted during the Revolutionary War period<sup>18</sup> — nor did it reflect more liberal notions of suffrage and representation that would follow. Accordingly, it limited the franchise to freeholders whose representatives, largely from rural enclaves, proved none too eager to extend the right to others. By the 1840s the situation, as described by one modern scholar, caused concern among defenders of majority rule:

Only four of ten adult white male citizens could vote, and those who could not were also still excluded from the jury boxes and

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12. See Kurland, *supra* note 3.

13. The latter phrase was coined by Charles Sumner in 1867. See W. WIECEK, *supra* note 4, at 2.

14. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

15. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 127-32 (1969).

16. See G. DENNISON, *THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861*, 13 (1976).

17. Cahn, *An American Contribution*, in *SUPREME COURT AND SUPREME LAW* 1-25 (E. Cahn ed. 1954).

18. See R. Traynor, *The Amending System of the United States Constitution, an Historical and Legal Analysis* 43-64 (1927) (thesis on file at Univ. of Calif. at Berkeley).

courts of the state. Freemen in Providence, a city of 21,870 people, constituted a mere 6 percent of the city's population, while in the tiny southern village of Jamestown they counted 16 percent.<sup>19</sup>

A Supreme Court Justice described Rhode Island's freeholder requirement by noting:

By the growth of the State in commerce and manufactures, this requirement had for some time been obnoxious; as it excluded so many adult males of personal worth and possessed of intelligence and wealth, though not of land, and as it made the ancient apportionment of the number of representatives, founded on real estate, very disproportionate to the present population and personal property in different portions and towns of the State.<sup>20</sup>

In a period during which a number of prominent states revised their constitutions,<sup>21</sup> the fact that Rhode Island was faced with a rising public clamor for reform is unsurprising. Because the malapportioned legislature rebuffed several reform efforts during the 1830s, a group of citizens, known as the suffragists, eventually took matters into their own hands. In August 1841 the suffragists held elections for delegates to a constitutional convention. Later that year the convention drafted a more liberal state constitution and submitted it for approval to all the state citizens, regardless of their status as freeholders. This newly constituted electorate<sup>22</sup> voted overwhelmingly in favor of the new People's Constitution. "Nearly 14,000 Rhode Islanders marked affirmative ballots, while only 52 opposed and 9,146 abstained. Based on accepted census tabulations, the Suffragists won an absolute majority of 2,372 out of a potential 23,142 votes. It is significant that a majority of the freemen approved

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19. G. DENNISON, *supra* note 16, at 27. Much of the description of the Dorr rebellion in this article is drawn from Dennison and from the decision in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). For other useful surveys, see Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. OF LEGAL HIST. 377 (1967); Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. OF LEGAL HIST. 111 (1972).

20. *Luther v. Borden*, 48 U.S. (7 How.) 1, 48 (1849) (Woodbury, J., dissenting).

21. See DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820s (M. Peterson ed. 1966).

22. See G. DENNISON, *supra* note 16, at 49. The election was held from December 27, 1841, to January 1, 1842.

the new instrument of government."<sup>23</sup> Elections subsequently were held under authority of the new constitution, and Thomas Dorr was elected governor.

Unfortunately for Dorr and his supporters, the Charter government refused to recognize Dorr's election or the constitution under which he had been elected. Nevertheless, because the Charter government felt pressured by the suffragists, it held its own freeholder's convention in November 1841. Although the constitution drafted by the Charter government was roughly comparable in its democratic sentiments to that drafted by the suffragists, it was narrowly defeated in a March 1842 referendum. The freeholder's convention, however, did serve as a prelude to yet another convention that would report out a document far more liberal than the Charter. That constitution was ratified in November 1842.<sup>24</sup> By the time the Dorr controversy reached the courts, both sides had accepted this new constitution as legitimate.

In the meantime, the General Assembly of the Charter government refused to accept the legitimacy of the Dorr government and eventually declared the statewide existence of martial law. The Charter government also successfully resisted Dorr's somewhat pathetic attempts to capture the state arsenal and otherwise assert his control of the state. While President Tyler prudently resisted calls to suppress the rebellion with federal troops, his statement of support for the Charter government early in the crisis generally is recognized as having an important role in undermining the legitimacy of the Dorr cause and assuring its collapse.<sup>25</sup> Dorr, who initially fled the state, soon returned and accepted imprisonment<sup>26</sup> so that he could seek vindication in the courts for the cause that he seemingly had won at the ballot box, but lost in the legislature of the Charter Government and on the battlefield.

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23. *Id.* at 53.

24. *See id.* at 98.

25. Chief Justice Taney thus noted that "it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution." *Luther v. Borden*, 48 U.S. (7 How.) 1, 44 (1849).

26. *See G. DENNISON, supra* note 16 at 107-08. Dorr's sentence ultimately was commuted after he spent a year in jail.

## II. Luther v. Borden: THE JUDICIARY AND DORR'S REBELLION

Ironically, the most prominent case involving Dorr's Rebellion was not Dorr's own. Instead, it was *Luther v. Borden*,<sup>27</sup> a case that percolated in the lower courts for years before finally being resolved by the Supreme Court in 1849. At issue was an action for trespass brought by Martin Luther, a Dorr supporter, against Luther Borden, a militiaman for the Charter government, for actions Borden had taken under authority of the Charter government's martial law proclamation. Borden had entered Luther's home and conducted a search for Luther. He found no one there because Luther had fled across the state border. Upon his return, however, Luther demanded payment of damages, arguing that the search had been illegal because the Charter government was not the legitimate republican government of Rhode Island and, therefore, could not authorize such a search. In essence, Luther asked the Court to side retrospectively with the arguably more democratic, albeit legally unrecognized, government that he had supported.

The Supreme Court rejected the argument. Chief Justice Taney, who regarded the question arising from "the unfortunate political differences" in Rhode Island to be both a "new question" and "a very grave one,"<sup>28</sup> wrote the opinion for the Court. Taney noted that a decision favorable to Luther would have potentially widespread consequences:

For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.<sup>29</sup>

In previous cases, Taney noted, claims about the legitimacy of a

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27. 48 U.S. (7 How.) 1 (1849).

28. *Id.* at 34-35.

29. *Id.* at 38-39.

state government had been entrusted to the “political department” of government.<sup>30</sup> He reasoned that courts act *under* constitutions and laws, not *above* them. Furthermore, according to Taney, a court that found the government under which it acted to be illegitimate would, by reason of its very decision, “cease to be a court.”<sup>31</sup> On matters of state law, Taney further stated, the decisions of Rhode Island’s courts, which had continued to recognize the Charter government, must be respected. Therefore, he concluded, it would be difficult to imagine how courts, on their own, could establish which voters were qualified and which government truly was supported by the people.<sup>32</sup>

To the extent that the Constitution addressed this situation, Taney argued that it entrusted decisions about the republican character of a state government to Congress when that body decided whether to seat congressmen.<sup>33</sup> Moreover, in addressing situations of domestic violence, Congress in 1795 had enacted legislation that entrusted certain powers to the President.<sup>34</sup> While such powers, like any others, conceivably could be abused, they would be checked — at least in part — by the visibility and responsibility of the presidential office.<sup>35</sup> Taney concluded that the President’s earlier recognition of the Charter government must be respected and that the General Assembly’s declaration of martial law was appropriate to the occasion.<sup>36</sup>

Taney therefore decided that the plaintiff’s argument, based “upon political rights and political questions,”<sup>37</sup> was inappropri-

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30. *Id.* at 39.

31. *Id.* at 40-41.

32. *See id.* at 42.

33. *See id.*

34. *See id.* at 43. This act provided:

[I]n case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.

*Id.*

Taney specifically linked this legislation, not to article IV, § 4, but to the domestic violence clause, which provides that Congress may “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST., art. I, § 8, cl. 15.

35. *See Luther*, 48 U.S. (7 How.) at 44.

36. *See id.* at 45-47.

37. *Id.* at 46.



ate for judicial resolution. While no one "has ever doubted the proposition, that . . . the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure," Taney concluded that "whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power."<sup>38</sup>

Interestingly, Justice Woodbury's dissenting opinion focused on the legality of Rhode Island's declaration of martial law rather than on the other substantive issues. Indeed, Woodbury, who had as a senator from New Hampshire indicated support for the Dorr government,<sup>39</sup> emphasized the political-question doctrine even more than had Taney. Not surprisingly, Woodbury's opinion reflects greater sensitivity to Dorr's claim: "It is not probable that the active leaders, and much less the masses, who were engaged on either side, had any intention to commit crimes or oppress illegally their fellow-citizens."<sup>40</sup> He also seemed to commend revolution in those instances in which the political processes are blocked.<sup>41</sup>

Woodbury's stance on the political question doctrine, however, was quite similar to Taney's. In Woodbury's scheme, as in Taney's, the judiciary should act under a constitution but not above it. "Our power begins," he wrote, "after theirs ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them."<sup>42</sup> Woodbury believed that the judiciary is not a check on "the people themselves" but

38. *Id.* at 47.

39. See G. DENNISON, *supra* note 16, at 129.

40. *Luther*, 48 U.S. (7 How.) at 50 (Woodbury, J., dissenting).

41. See *id.* at 55. Woodbury thus noted:

If it be asked what redress have the people, if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those, they go to the ballot-boxes, to the legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of constitutions. And when the former fail, and these last are forbidden by statutes, all that is left in extreme cases, where the suffering is intolerable and the prospect is good of relief by action of the people without the forms of law, is to do as did Hampden and Washington, and venture action without those forms, and abide the consequences.

*Id.*

42. *Id.* at 52.

rather on their legislature or their executive.<sup>43</sup> He also noted that questions involving the validity of a given constitution were political: "They are too near all the great fundamental principles in government, and are too momentous, ever to have been intrusted by our jealous fathers to a body of men like judges, holding office for life, independent in salary, and not elected by the people themselves."<sup>44</sup> Faced with oppression, the people must resort to the ballot boxes or, when this fails, to revolution.<sup>45</sup> Success, he concluded, will depend in such circumstances not on judicial judgments but on the force of arms and the moderation of responding governments.

The *Luther* opinion, coming six years after the Dorr Rebellion, recognized that whatever rights or wrongs had been involved, little could be gained and possible chaos could be reaped by giving ex post facto recognition to a government that, even in the eyes of its supporters, had never been able to assert its own authority. The pragmatism of the result makes it difficult to fault the decision in that respect.

The Court's summary treatment of the guarantee clause, however, is more troublesome. First, the Court read the clause as giving solely to Congress and the President a power seemingly entrusted to all three branches.<sup>46</sup> Moreover, by construing the guarantee clause as a nonjusticiable provision, the Court arguably allowed states to sanction a series of individual procedures that had the ultimate effect of transforming a genuinely republican government into one that was not. The only relief available in such cases would come from either the Congress, who could refuse to seat a state delegation, or the President, who could deal with the recalcitrant state by force.<sup>47</sup> Neither method of relief, however, was tailored to individual grievances.

Moreover, the Court's decision, if it is the only lens through which one views the Dorr controversy, may obscure the wider implications of the rebellion. The apparent conflict between numerical majorities and constituted authority generated intense

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43. *Id.* at 53.

44. *Id.* at 54.

45. *See id.* at 55.

46. *See* Merritt, *supra* note 10, at 75.

47. By also focusing chiefly on presidential responses, Calhoun's position is subject, in part, to this same criticism. *See infra* notes 67-76 and accompanying text.

political debate that extended well beyond the confines of Rhode Island. Partisans on both sides met with President Tyler before he declared his support for the Charter government. Congress also showed a keen interest in the Rhode Island controversy. The congressional debate was largely a partisan squabble with one committee, composed of a majority of Democrats, issuing a report highly critical of Tyler's actions.<sup>48</sup> There were additional attempts to introduce the controversy at the Democratic Conventions of 1844 and 1848.<sup>49</sup>

### III. CALHOUN AND THE RHODE ISLAND CONTROVERSY

Because of the intense political debate over Dorr's rebellion, the controversy generated much commentary long before the Supreme Court's decision in *Luther v. Borden*. The most comprehensive treatment perhaps resulted from an exchange of letters between William Smith and Senator John C. Calhoun. Smith was a Rhode Islander and a moderate supporter of the Dorr government;<sup>50</sup> Calhoun was a prominent South Carolinian and a potential presidential candidate in 1844. Smith propounded six questions regarding the rebellion to Calhoun, who responded in a letter dated July 3, 1843.<sup>51</sup> Calhoun's letter reflected several weeks of thought and composition<sup>52</sup> and is considered to be "one of his principal political essays."<sup>53</sup>

Although references to Madison, Jefferson, Marshall, Webster, or Lincoln are not unusual in contemporary constitutional discourse, mention of Calhoun is found less often. This is largely because Calhoun epitomized those who defended slavery, not simply as a necessary evil to be tolerated, but rather as a posi-

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48. See G. DENNISON, *supra* note 16, at 134-46.

49. See *id.* at 137. Significantly, Dennison cites Calhoun as one who was instrumental in keeping the issue from reaching the convention floor. *Id.*

50. See *id.* at 77.

51. Letter from John C. Calhoun to William Smith (July 3, 1843) [hereinafter Smith Letter], reprinted in 17 THE PAPERS OF JOHN C. CALHOUN 270 (C. Wilson ed. 1986) [hereinafter PAPERS].

52. Thus, Calhoun wrote that "I have made my answer full; in fact covered the whole ground, and in a great measure exhausted the subject." Letter from John C. Calhoun to Robert M. T. Hunter (Aug. 6, 1843), reprinted in 17 PAPERS, *supra* note 51, at 335.

53. See W. WIECEK, *supra* note 4, at 134.

tive good to be furthered.<sup>54</sup> Moreover, Calhoun is almost inextricably linked to the now-discredited notion of nullification and its handmaiden, secession.<sup>55</sup>

Despite these negative associations, Calhoun, who served as a United States Representative, Senator, Vice President, and Secretary of State, easily takes his place among the most prominent of American statesmen in the first half of the nineteenth century. Though Calhoun was born too late to be considered one of America's founding fathers, his constitutional reasoning is still respected for its depth and logical clarity. His *Disquisition on Government*<sup>56</sup> generally is regarded as one of the most important American contributions to political theory, and his *Discourse on the Government and Constitution of the United States*<sup>57</sup> is among the most comprehensive treatments of the subject written in America's first century. In a manner characteristic of his better-known works, Calhoun's letter to Smith recognized the issues surrounding Dorr's rebellion as more than mere partisan controversies and attempted to place them in a broader theoretical and constitutional context.

Smith's first question asked whether each state possessed a republican form of government when it ratified the Constitution. Calhoun's affirmative reply was based on twin assumptions: (1) the Union would not have accepted a state that was not republican and (2) a state would not have entered the Union with the understanding that its own government would be suppressed.

To suppose . . . that any State whose government was not republican, within the meaning of the guarantee, would ratify the Constitution and enter the Union, and that the other States would accept the ratification and admit her, is too absurd for belief. It would be to suppose, that the State, so ratifying, stipulated for the suppression of the very government under which it entered the Union. . . . It would also be to suppose, that the other States, in . . . admitting her into the Union, permitted

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54. See J. C. CALHOUN, *A Disquisition on Government*, in 1 WORKS OF JOHN C. CALHOUN 1 (R. Crallé ed. 1851) [hereinafter *Disquisition*].

55. See J. C. CALHOUN, *The South Carolina Exposition*, in 10 PAPERS, *supra* note 51, at 442 (containing both Calhoun's original draft and a subsequent revision).

56. See *Disquisition*, *supra* note 54.

57. See J. C. CALHOUN, *A Discourse on the Constitution and Government of the United States*, in 1 WORKS OF JOHN C. CALHOUN 111 (R. Crallé ed. 1851) [hereinafter *Discourse*].

that to be done, which was directly opposed to the guarantee  
 . . . .<sup>58</sup>

Calhoun's answer thus suggested that no infirmity that existed in any of the original thirteen states could be challenged as a violation of the guarantee clause.

The second question posed to Calhoun was whether the President, before rendering aid in a case of domestic violence within a state, should pause to consider whether the state government was republican. This time Calhoun's affirmative answer, in which he acknowledged such a "high and delicate right," was more qualified. He attempted to place the guarantee clause in the larger context of the "guarantee section" of which it is a part.<sup>59</sup>

Calhoun identified three separate guarantees in article IV, section 4 of the Constitution: "that of a republican form of government, to every State of the Union, that of protection to each against invasion, and that against domestic violence, on the application of the Legislature, or the Executive, when the Legislature cannot be convened."<sup>60</sup> Calhoun further tied these three clauses to three objects listed in the preamble to the Constitution: "to insure domestic tranquility, provide for the common defence, and to secure the blessings of liberty to ourselves and our posterity."<sup>61</sup> These three clauses sought separately to guarantee "the peace, safety and liberty of the States."<sup>62</sup> The guarantee against domestic violence protected states from attacks from within; the provision against invasion protected states from external attacks; finally, the guarantee of a republican government protected states "from the ambition and usurpation of . . . governments, or . . . rulers."<sup>63</sup>

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58. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 270-71.

59. *See id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 271.

60. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 271-72.

61. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 272 (quoting U.S. CONST. preamble).

62. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 272.

63. *Id.* Calhoun thereby deduced the meaning of the guarantee clause by a process that Charles Black has called "structure and relation." *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). One difficulty with this approach is ascertaining which structures or relations to emphasize. For example, one contemporary commentator on the guarantee clause, who cites Black for authority, focuses not on the relation of the guarantee clause to the provisions against violence and invasion but on its relation to the full faith and credit clause, the privileges and immunities clause, and, by

The provision against domestic violence, Calhoun argued, was a protection for state governments. Accordingly, this is the only one of the provisions in which action must be initiated by the state government itself, either by application of the legislature or, when it is not in session, the executive. The provision against invasion, designed to protect the states as a whole, is part of the Union's responsibility in preserving its sovereignty.

This led to Calhoun's interpretation of the guarantee clause. "[I]ts object," Calhoun wrote, "is the reverse of that of protection against domestic violence. . . . [I]nstead of being intended to protect the *Governments* of the States, it is intended to protect each *State* . . . against its Government; or, more strictly, against the ambition or usurpation of its rulers."<sup>64</sup> Designed to protect states against rulers' attempts "to change the forms of their governments, and to destroy their liberty,"<sup>65</sup> this provision did not require application by a state government to be effectual. Indeed, "it would be a perfect absurdity to require, that the party, against which the guarantee is intended to protect, should make application to be protected against itself."<sup>66</sup>

Calhoun believed the federal right to intervene against the state's rulers to be "a high and delicate one; the highest and most delicate of any conferred on the Federal government: and . . . the most dangerous, if . . . not . . . subject to such restrictions, as left but little discretion in its exercise."<sup>67</sup> Calhoun's re-

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analogy, to the due process clause of the Fourteenth Amendment. See Note, *supra* note 8, at 568-69.

64. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 274 (emphasis in original). Interestingly, Calhoun's argument is on this point is close to Kurland's. See Kurland, *supra* note 3, at \_\_\_\_ Kurland believes that:

[t]he clause exists not as a procedural guarantee to the institutions of state government, but rather, as a collective substantive guarantee to the people of each state, including the people of each political community within each state, of protection from the erosion of republican principles of government at all levels of government.

*Id.* The distinction between the two lies in the entity protected. Calhoun focused on the state. Kurland focuses on the people.

65. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 274. Calhoun thus distinguished between two meanings of "state" in the separate clauses of article IV, § 4. This interpretation seems preferable to one that requires that they be the same. For an attempt to follow this latter path, see Ferguson, *supra* note 4, at 411.

66. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 275.

67. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 276.

strictions may be divided into three parts.<sup>68</sup> First, he argued that the federal government “has no right, whatever, in any case, to look beyond [a state’s] admission into the Union,” since such admission was acknowledgment of the state’s republican character.<sup>69</sup> Second, Calhoun believed that no changes, apart from those that “alter [a state government’s] form, or make it different in some essential particular, from those of the other States, at the time of their adoption,” would qualify for federal attention.<sup>70</sup> Calhoun reiterated this belief in his third restriction: “[T]he forms of the governments of the several States, composing the Union, as they stood at the time of their admission, are the proper standard, by which to determine whether any after change, in any of them, makes its form of government other than republican.”<sup>71</sup> Taken together, these restrictions not only would leave the federal government little discretion, but they also would protect slavery, the South’s peculiar institution, as well as states with restrictions on suffrage.<sup>72</sup> Indeed, Calhoun obviously had formulated his guidelines in the knowledge that under more abstract standards, “[t]he Governments of one half of the States of the Union would not stand the test, which would be adopted by a large portion of the other half.”<sup>73</sup>

Calhoun’s analysis urged caution even when intervention by the federal government might be warranted. Temporary usurpations of state government normally would be dealt with by resort to the ballot box at the state level itself. Only if state leaders used force to usurp power, “and not before,” would federal intervention be appropriate to suppress the usurpation.<sup>74</sup>

Of course, the state citizens themselves might initiate changes in their constitution that would alter the state government’s fundamental character. Calhoun saw no remedy for these changes and argued that liberty “cannot be forced on a people” but “must be voluntarily embraced.”<sup>75</sup> Thus, a voluntary change

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68. See W. WIECEK, *supra* note 4, at 134-35. I have used Wiecek’s outline, although the second and third points he identifies are quite similar.

69. Smith Letter, *reprinted in* 17 PAPERS *supra* note 51, at 277.

70. *Id.*

71. *Id.*

72. See *Discourse*, *supra* note 57, at 333.

73. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 278.

74. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 277.

75. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 275.

in the form of state government would constitute "a clear case of secession," although Calhoun did caution that any doubt about whether the state remained republican should be resolved in favor of maintaining the state within the Union.<sup>76</sup>

Having conceded that the President has limited authority to inquire into the republican character of a state government requesting federal aid to quell rebellion, Calhoun proceeded to address Smith's third question. Smith asked whether "the numerical majority of the people" of a state in the Union has "the right to alter or abolish the Constitution, regardless of the mode prescribed for its amendment, if any; and where there is none, of the refusal or assent of such State?"<sup>77</sup> Consistent with his distrust of numerical majorities in the *Disquisition*,<sup>78</sup> Calhoun responded in the negative, drawing a clear line between the right of revolution and the right to bring about change by constitutional means.

If a right existed for the numerical majority to change the government, he stated, it needed to be either a natural right or a political right.<sup>79</sup> Natural rights either precede the political state or are reclaimed by individuals "only where government has failed in the great objects for which it was ordained, the security and happiness of the people; and then only where no other remedy can be applied."<sup>80</sup> In a functioning political state, however, natural rights become "political rights, . . . that is, rights derived from agreement or compact, express or implied."<sup>81</sup> At the national level and in all but two states, drafters of the various constitutions had established procedures to amend those constitutions. These specifications, Calhoun argued, proceeded not

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76. *Id.*, reprinted in 17 PAPERS, *supra* note 51, at 278.

77. *Id.*, reprinted in 17 PAPERS, *supra* note 51, at 278-79.

78. See *Disquisition*, *supra* note 54, at 19-31. (distinguishing between a numerical and a concurrent majority).

79. John Whipple, who with Daniel Webster defended Borden before the Supreme Court, made a similar argument in that case, distinguishing natural, civil, and political rights and classifying political rights, such as the right to vote, as "matters of practical utility." See *Luther v. Borden*, 48 U.S. (7 How.) 1, 28 (1849). Since Calhoun's letter to Smith was a public document, it may well have influenced Whipple in making his argument.

80. Smith Letter, reprinted in 17 PAPERS, *supra* note 51, at 282. Calhoun thus recognized the right of revolution as a moral right rather than as a legal right. See A. SPAIN, *THE POLITICAL THEORY OF JOHN C. CALHOUN* 118 (1951).

81. Smith Letter, reprinted in 17 PAPERS, *supra* note 51, at 279.



from doubts about government's power to propose amendments but from a desire to restrain the amending process.<sup>82</sup> Thus, amendments must proceed either according to specified forms or, when they are lacking, with the government's approval.

Paradoxically, Calhoun argued that the people possess "the power to make, alter or abolish constitutions," but governments possess all other powers, including "that of proposing amendments to their Constitutions, and calling conventions of the people, for the purpose of amending, or proposing amendments, to be ratified by the people."<sup>83</sup> Allowing the general government to accept the right of a simple numerical majority to change a state's constitution on its whim would lead to anarchy.

In answering the fourth question propounded to him, Calhoun stated that if he were elected President, he would protect a state against a numerical majority seeking changes through other than constitutional means.<sup>84</sup> Moreover, consistent with his earlier argument, Calhoun answered a fifth question by asserting that the state citizens who abolished their republican form of government "constitutionally and legally" would forfeit their place in the Union.<sup>85</sup> Finally, Calhoun answered Smith's sixth question by reaffirming his own support of expanded state suffrage. He, nonetheless, made clear that he regarded that matter and the proper composition of the government of Rhode Island as "strictly domestic questions."<sup>86</sup>

#### IV. CALHOUN AND THE CONTEMPORARY VIEW OF THE GUARANTEE CLAUSE

Pointing to Calhoun's undoubted desire to protect slavery, the chief commentator on the guarantee clause has called Calhoun's reasoning in the letter to Smith "narrowly syllogistic."<sup>87</sup> This criticism is too harsh. The greatest strength of Calhoun's position may be its syllogistic quality, as well as its clear distinction between constitutional change and revolutionary change and its close attention to the actual wording of article IV, sec-

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82. See *id.*, reprinted in 17 PAPERS, *supra* note 51, at 281-82.

83. *Id.*, reprinted in 17 PAPERS, *supra* note 51, at 281.

84. See *id.*, reprinted in 17 PAPERS, *supra* note 51, at 286-87.

85. *Id.*, reprinted in 17 PAPERS, *supra* note 51, at 287.

86. *Id.*, reprinted in 17 PAPERS, *supra* note 51, at 288.

87. See W. WIECEK, *supra* note 4, at 136.

tion 4.

The version of the guarantee clause accepted by the Constitutional Convention on June 11, 1787, simply stated that "a republican constitution, and its existing laws ought to be guaranteed to each state by the United States."<sup>88</sup> On July 18 of that year this provision was changed into wording that is substantially like that in the Constitution today: "That a Republican form of Governmt. shall be guaranteed to each State & that each State shall be protected agst. foreign & domestic violence."<sup>89</sup> This alteration was important. It more clearly enabled states, using procedures similar to those of the national government, to make changes in their constitutions and laws as defects arose or as circumstances otherwise warranted.<sup>90</sup> This change also created an ambiguity about whether the additional provisions against domestic violence and invasion were amplifications of the guarantee clause or additional and separable guarantees with interrelated aims. Some writers treat section 4 as a whole.<sup>91</sup> Others begin by noting that the provisions are separable, but proceed to discuss them together.<sup>92</sup> Others treat the clauses separately<sup>93</sup> or ambiguously.<sup>94</sup>

Calhoun, however, consistently argued that the second two clauses were additional guarantees and not mere amplifications of the first. He believed that the President could act to guarantee a republican government even when not requested to do so by a state governor.<sup>95</sup> Calhoun based his arguments on two

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88. *Id.* at 54.

89. *Id.* at 58.

90. *See id.* at 76.

91. *See, e.g.,* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 677-78 (R. Rotunda & J. Nowak rev. ed. 1987) (3d ed. 1833).

92. *See, e.g.,* W. WIECEK, *supra* note 4.

93. *See, e.g.,* Kurland, *supra* note 3.

94. *See* W. WIECEK, *supra* note 4, at 63-67. Wiecek notes that *The Federalist Papers* reflected a split personality on this issue. Madison stressed the positive aspects of republicanism, noting its guarantee of majority rule in a representative system. *See* THE FEDERALIST No. 43 (J. Madison). Hamilton emphasized the negative, noting how the guarantee section would prevent domestic insurrections and the establishment of monarchies. *See* THE FEDERALIST No. 21 (A. Hamilton). This differing treatment simply may reflect such ambiguity.

95. Calhoun's response to Smith's second question arguably blurred the distinction between the first clause in article IV, section 4 and the other two by indicating that the President must determine whether an existing government is republican before extending aid against domestic insurrections. This concession shows the limits of Calhoun's

points: (1) the distinct goals the clauses seek to secure, which he tied to the Preamble and (2) the differing modes of application required to trigger protection of each provision. According to Calhoun, the federal government needed a request from the state government to act under the provision guaranteeing protection against domestic violence; the other guarantees empowered the federal government to act unilaterally.

Calhoun believed that the guarantee clause guaranteed "liberty." Although such a claim might not sufficiently narrow the concept, it appears compatible with most of the major modern interpretations of the clause.<sup>96</sup> This interpretation also sets the provision apart from the other clauses in article IV, section 4, both of which were concerned with a state government's physical security.<sup>97</sup>

Calhoun's views, of course, were restricted by three provisos that surely would not prove convincing to those scholars who accept the notion that constitutional provisions — especially those that are phrased in general terms similar to the guarantee clause<sup>98</sup> — may grow beyond the intentions of those who formulated them.<sup>99</sup> To the extent that the founders' intentions are still regarded as one important element of constitutional interpretation, however, and to the extent that Calhoun's strictures clarify the limits on the guarantee clause accepted by the framers, these provisos are of continuing usefulness in restricting interpretations that would depart too far afield from the founders' intentions. Moreover, they reinforce the point that the guarantee clause makes little sense in the first place, apart from some state autonomy.<sup>100</sup>

Ironically, one of the greatest obstacles to adoption of Calhoun's views of the guarantee clause today is the structure of

approach. For additional insights into whether article IV, § 4 consists of one clause or three, see Ferguson, *supra* note 4, at 412-14.

96. *But see* Note, *supra* note 9. (arguing that the clause might be used to give stricter scrutiny to state regulation).

97. See U.S. CONST., art. IV, § 4.

98. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 134-36 (1977).

99. See W. WIECEK, *supra* note 4, at 242. For further thoughts on the strengths and limits of the doctrine of "original intent," see Fisher, *Methods of Constitutional Interpretation: The Limits of Original Intent*, 18 CUMB. L. REV. 43 (1987). See also Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 559-60 (1962).

100. See Merritt, *supra* note 10 at 3, 25.

state sovereignty upon which he based his comments. Specifically, his argument that a state whose people voluntarily renounced a republican form of government had seceded would hardly be acceptable in the aftermath of the Civil War or Chief Justice Chase's generally accepted dictum that the Constitution "looks to an indestructible Union, composed of indestructible States."<sup>101</sup> There is reason to argue, however, that in addition to modifications such as the fourteenth amendment, which have altered the federal system since the time Calhoun was writing, Calhoun's own arguments on this point were not completely consistent.

Because Calhoun argued that the guarantee clause was designed to protect the people's liberty, he raised at least two objections to regarding the people themselves, as opposed to their rulers, as a threat against which the guarantee clause was designed to guard. First, he believed that, as parties to the guarantee, "it would be absurd to suppose that [the states] undertook to enter into a guarantee against themselves."<sup>102</sup>

The weakness of Calhoun's analysis here is that it ignores the observation of John Marshall and his Federalist colleagues that the Constitution had been ratified, not by state legislatures, but by the people themselves acting through special conventions in each of the states.<sup>103</sup> Moreover, Calhoun's more general theory of government does not compel consideration of such self-limitation as an absurdity. Calhoun believed that a central purpose of the Constitution was to place restraints on the numerical majority. There is no reason why the people of a state or their current government should not want to bind or limit a government of tomorrow. In Calhoun's own language:

Constitutions stand to governments, as laws do to individuals. As the object of laws is, to regulate and restrain the actions of individuals, so as to prevent one from oppressing or doing violence to another, so, in like manner, that of constitutions is, to regulate and restrain the actions of governments, so that those who exercise its powers, shall not oppress or do violence to the rest of the community. Without laws, there would be universal anarchy and violence in the community; and, without constitu-

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101. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

102. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 275.

103. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819).

tions, unlimited despotism and oppression.<sup>104</sup>

Calhoun's second argument against viewing the guarantee clause as a restraint on the people, as well as upon their governors, was more substantive. Referring to liberty, Calhoun observed:

It must be voluntarily embraced. If the people do not choose to embrace it, or continue it, after they have, it cannot be forced on them. The very act of doing so, would destroy it; and divest the State of its independence and sovereignty, and sink it into a dependent province.<sup>105</sup>

In making this objection, he anticipated the argument that the guarantee clause may be an important guarantee of state independence;<sup>106</sup> in a federal system, there are necessary limits on attempts to force a state to be free. Calhoun, however, pressed this argument too far. His objection may be met both by the exercise of sound discretion on the part of the federal government in evoking the guarantee clause and perhaps by the subtle, Federalist distinction between the people and government of a state.

Calhoun argued that action taken by the people of a state "acting in their political character, as citizens, and according to constitutional and legal forms," must be taken to be the actions of a state itself.<sup>107</sup> This phraseology itself may be significant in that it appears to leave open the possibility of federal intervention when state governments, or their officials, act illegally or unconstitutionally.<sup>108</sup> Beyond that, however, Calhoun's own strictures on the dangers of numerical majorities would indicate that when state constitutional protections were not strong enough or when temporary passions might sway the people, a state government possibly could be changed peacefully from its republican form, albeit against the more permanent interests and wishes of its citizens. In such cases, federal intervention

104. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 284.

105. *Id.*, *reprinted in* 17 PAPERS, *supra* note 51, at 275. Today this concern remains a major obstacle to wide expansion of the guarantee clause. One writer calls the clause "a self-deactivating constitutional provision." See Note, *supra* note 7, at 689.

106. See Merritt, *supra* note 10, at 3, 25.

107. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 275.

108. Several modern commentators have made the same point about the guarantee clause. See, e.g., Kurland, *supra* note 3; Note, *supra* note 8.

hardly would be inimical to the interests of the state's people.

Undoubtedly, Calhoun was reluctant to distinguish between a state and its people for fear of encouraging chaos by justifying aid to a numerical majority who refused to work through existing constitutional channels. By failing to recognize this distinction, however, Calhoun's analysis of state government collapses into the paradox. In a state in which all means of constitutional change are blocked effectively by existing law or by a system of limited suffrage — both of which were factors in the Rhode Island rebellion — the only solution is to urge people to work through the very system that was blocking their efforts.<sup>109</sup>

The paradox is worthy of attention because of its similarity to that encountered in modern discussions of state legislative apportionment. In *Colegrove v. Green*<sup>110</sup> Justice Frankfurter took the position, which he traced to the decision in *Luther v. Borden*, that such state legislative apportionment is a "political question" falling under the guarantee clause. According to this view, eventually repudiated by the Court's decision in *Baker v. Carr*,<sup>111</sup> legislative reapportionment is a matter for state governments to resolve. "In this situation," Frankfurter wrote, "as in others of like nature, appeal for relief does not belong [in the courts]. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."<sup>112</sup> For plaintiffs arguing that the state's electoral system gave them ineffectual representation, Frankfurter's advice to work through that system to elect representatives sympathetic to their interests must have seemed hollow.

The difficulty of Frankfurter's position arguably was remedied when the Supreme Court declared that relief was available to citizens under the equal protection clause.<sup>113</sup> Application of the guarantee clause to voluntary — that is, peaceful — state

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109. For the circularity of this position, see Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125, 1131-34 (1987).

110. 328 U.S. 549 (1946).

111. 369 U.S. 186 (1962).

112. *Id.* at 270 (Frankfurter, J., dissenting).

113. *See id.* at 228.

renunciations of republican government and to forceful and fraudulent governmental efforts to maintain power might serve as a similar solution to the dilemma posed by Calhoun's analysis.<sup>114</sup>

Calhoun argued that when faced with a petition from a state for help, the federal government should either extend aid under the domestic violence clause or refuse it under the guarantee clause because the government was not republican and, therefore, no longer in the union. Calhoun was willing for the federal government to act unilaterally against a state government only if it had been violently taken over by usurpers. He thus expressed confidence that the people could effect all necessary changes at the state level through peaceful means rather than by revolutionary violence.

This confidence leads into the most puzzling aspect of Calhoun's letter to William Smith. Near the end of this letter, Calhoun cited the founders' faith in the people's capacity for self-government. This confidence, and their exclusion of violence and revolution as legitimate means of effecting constitutional change, led them to believe that "if reason be left free to combat error, all the amendments which time and experience might show to be necessary, would, in the end, be made; and that the system, under their salutary influence, would go on indefinitely, purifying and perfecting itself."<sup>115</sup> Calhoun added:

Thus thinking, the liberty of the press, the freedom of speech and debate, the trial by jury, the privilege of *Habeas Corpus*, and the right of the people peaceably to assemble together, and petition for a redress of grievances, are all put under the sacred guarantee of the Federal Constitution, and secured to the citizen against the power both of the Federal and State Governments. Thus it is, that the same high power, which guarantees protection to the Governments of the States against change or subversion by physical force, guarantees, at the same time, to the citizens protection against restrictions on the unlimited use of these great moral agents for effecting such changes as reason may show to be necessary.<sup>116</sup>

Not only is this passage one of the most liberal in the writ-

114. See Kurland, *supra* note 3.

115. Smith Letter, reprinted in 17 PAPERS, *supra* note 51, at 290.

116. *Id.*

ings of a man not generally known for his liberalism,<sup>117</sup> but it appears by Calhoun's own constitutional strictures, as well as by contemporary standards of his day, to be untrue.<sup>118</sup> While all the guarantees listed were indeed provided under the federal Constitution, during the time Calhoun wrote, they were not "secured to the citizen[s] against the power both of the Federal and State Governments."<sup>119</sup> The privilege of habeas corpus was granted in article I, section 9 against *federal* suspension,<sup>120</sup> the other guarantees were found in the Bill of Rights, and the Supreme Court's decision had authoritatively established in *Barron v. Mayor of Baltimore*<sup>121</sup> that those guarantees applied only to the national government and not against the states.<sup>122</sup> Moreover, Calhoun's own analysis of the guarantee clause would appear to exclude forcing such guarantees upon states that did not care to have them.<sup>123</sup>

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117. But see R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 103-10 (1940).

118. Interestingly, one may note the strong parallels between Calhoun's position here and modern process-based theories of judicial review. Contemporary proponents of judicial review argue that the main function of the judiciary is to keep state and national political processes open and functioning, leaving resolution of specific grievances to the democratic process itself. See, e.g., J. ELY, *supra* note 3. The parallel would be more complete if Calhoun had added the right to vote to his list of federal guarantees.

119. Smith Letter, *reprinted in* 17 PAPERS, *supra* note 51, at 290.

120. This clause provides that: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Its placement in article I, § 9, rather than in § 10, suggests that the clause was intended to regulate congressional actions rather than state actions.

121. 32 U.S. (7 Pet.) 243 (1833).

122. The Supreme Court has never overruled *Barron*. The provisions of the Bill of Rights have been made applicable to the states through the due process clause of the fourteenth amendment. This process is known as the doctrine of selective incorporation. See *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy clause); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule required for violations of fourth amendment); *Wolf v. Colorado*, 338 U.S. 25 (1949) (fourth amendment); *Fiske v. Kansas*, 274 U.S. 380 (1927) (first amendment); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 266 (1897) (fifth amendment takings and just compensation clauses). For a thorough discussion of the controversy surrounding the incorporation doctrine, see *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

123. Calhoun possibly was introducing these specific guarantees as hallmarks of a republican government. The author however, can find no other evidence from Calhoun's letter to William Smith, or elsewhere, indicating that this was his intention.



One has difficulty in believing that Calhoun, as a lawyer and statesman particularly concerned about federal relations, did not know about *Barron*. Even more difficult to believe is that he would defend his arguments for peaceful change against revolutionary change with an untruth, particularly one that would be so easily called into question. Whether intentional or not, Calhoun's plea for the exclusion of violence appeared to rest on the notion that the guarantees most essential to the political processes at both state and federal levels had been guaranteed by the federal Constitution.

Given this premise, one well might be justified in believing that whatever temporary deviations occur, ultimately the people of each state will be able to adapt their laws and constitutions to their needs without revolutionary violence or, except in unusual circumstances, additional federal intervention. While the reapportionment cases decided under the fourteenth amendment and the application of major provisions of the Bill of Rights to the states may have done much to assure that this will be the case, perhaps the guarantee clause may be used to assure that state political processes are kept open and free of fraud and that individual rights of expression and political participation are usurped by neither force nor fraud. A similar argument has been advanced compellingly in the most recent scholarly discussion of the guarantee clause.<sup>124</sup> If such an interpretation is accepted, occasions like Dorr's rebellion, in which a President might be called upon to use physical force or threaten to use it to protect an exigent state government, should be rare.

## V. CONCLUSION

What, then, can be said of Calhoun's contribution to an understanding of the guarantee clause? If one comes to Calhoun looking for a prescription that will enable one to decide precisely how the guarantee clause should be applied in the contemporary setting, one is likely to be disappointed. American federalism

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124. See Kurland, *supra* note 3. Kurland proposes legislation whereby "whoever knowingly executes or attempts to execute any scheme or artifice to defraud or deprive the citizenry of a State or locality of its right to honest, faithful and loyal government of such State or locality, shall be fined . . . or imprisoned." *Id.* at 471. He convincingly argues that while this provision would be subject to judicial review, the Court should apply a "rational basis" test to the legislation and uphold it. *See id.* at 458-59.

has changed drastically since Calhoun's day by developments that include the ratification of the fourteenth amendment and the more gradual judicial incorporation of most of the provisions of the Bill of Rights into the due process clause of that amendment so that now they also apply to the states.<sup>125</sup> Calhoun's argument, that the people of a state should be permitted to renounce voluntarily the republican government, was inadequate when made<sup>126</sup> and even less acceptable in the aftermath of the Civil War. Similarly, Calhoun's hope to limit the application of the guarantee clause to governmental defects that did not characterize any of the states when they were admitted to the Union is unconvincing to those who believe that a clause phrased in general terms may expand beyond the narrow intentions of those who framed it.<sup>127</sup>

The weaknesses of Calhoun's analysis, however, must not obscure its strengths. His analysis is perhaps the most complete exposition of the clause offered before Chief Justice Taney's gloss in *Luther v. Borden*.<sup>128</sup> Much more clearly than that decision, Calhoun's analysis separated the guarantee clause from the two constitutional provisions that accompany it. Furthermore, as with a more contemporary scholar's interpretations,<sup>129</sup> Calhoun's view offers a salutary caution against adoption of extreme interpretations which would forget that the Constitution is intended for the people of the states to be able to make certain important political decisions on their own. Calhoun's understanding that the clause was a guarantee of liberty against state governors that, unlike the accompanying domestic violence provisions, does not predicate federal response upon the request by state officials for help,<sup>130</sup> is an important clue to understanding its meaning. So, too, Calhoun's stress on the need for people in a republican government to work through recognized legal means if minority rights are to be protected and good order preserved, illumines the very essence of the concept of ordered liberty in which human rights are translated into effective civil and politi-

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125. See Bonfield, *supra* note 99.

126. See *supra* notes 105-108 and accompanying text.

127. See *supra* note 99 and accompanying text.

128. 48 U.S. 1 (7 How.) (1849).

129. See Merritt, *supra* note 10.

130. See *supra* notes 64-74 and accompanying text.

cal rights.

Calhoun's analysis unintentionally may have pointed to the further truth that if citizens are to be constrained to seek change through legal and nonviolent means, they need some assurance that these existing procedures are fair and open and that discovered defects in government will be subject to change.<sup>131</sup> Perhaps the central weakness of Calhoun's position, as well as many other expositions of the application of the guarantee clause to Dorr's rebellion, was that the Rhode Island citizens who participated in that rebellion had no assurance that their voices would be heard given the makeup of that state's political system. If modern proponents of change at the state level can be given such assurance, whether by the equal protection clause, the guarantee clause, or by other constitutional mechanisms,<sup>132</sup> Calhoun's own plea for the exclusive recognition of groups using legal means to attain their ends becomes much stronger.

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131. See *supra* notes 115-124 and accompanying text.

132. See Kurland, *supra* note 3.